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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

NORTHERN CALIFORNIA MOTOR CAR DEALERS ASSOCIATION, INC. and MOTOR CAR DEALERS ASSOCIATION OF SOUTHERN CALIFORNIA, INC., et al.,
Petitioners,

VS.

CHEVROLET MOTOR DIVISION, GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

JAMES R. MCCALL
Professor of Law, U.C. Hastings,
Of Counsel
RICHARD E. CROW
Counsel of Record
CROW, LYTLE, GILWEE,
DONOGHUE, ADLER & WENINGER
700 E Street
Sacramento, CA 95814
Telephone: (916) 441-2980

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

QUESTIONS PRESENTED

1. Is every automobile dealer biased as a matter of law and therefore prevented by the Due Process Clause of the United States Constitution from being an adjudicating member of a state administrative tribunal that determines whether an automobile manufacturer has shown good cause required by statute for the lawful termination of a franchise of an individual dealer?

2. Assuming that all automobile dealers are biased as a matter of law and therefore prevented by the Due Process Clause from being adjudicating members of such a tribunal, does the Due Process Clause also prevent an automobile dealer from participating as a non-adjudicating member of the tribunal when it makes good cause determinations in franchise termination cases?

3. Does the Due Process Clause prohibit the appointment of a knowledgeable participant in a complex market to an administrative board that determines factual issues in disputes between buyers and sellers in that market?

TABLE OF CONTENTS

	Page
Questions presented	i
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement of the case	2
Reasons for granting the writ	5
I	
The court below acted on what it mistakenly believed was the compulsion of the federal constitution without any consideration of California law	5
II	
The decision below determines a federal question of great substance in a way that clearly conflicts with the applicable decisions of this court	9
III	
The decision below creates a conflict between state courts of last resort on a question of great significance, and the erroneous theories announced in the decision below call into question virtually all administrative tribunal decisions in situations in which the tribunals include participants in the economic life regulated by the tribunal	22

TABLE OF AUTHORITIES CITED

Cases

Page

American Motors Sales Corp. v. New Motor Vehicle Board, 69 C.A.3d 983, 138 Cal.Rptr. 594 (1977) ..*passim*

Andrews v. Agricultural Labor Relations Board, 28 Cal.3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (1981) 6

Cafeteria Workers v. McElroy, 367 U.S. 886, 6 L.Ed.2d 1230, 81 S.Ct. 1743 (1961) 15

Chevrolet Motor Division, etc. v. New Motor Vehicle Board, 146 Cal.App.3d 533, 194 Cal.Rptr. 270 (1983) 1, 20

City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 71 L.Ed.2d 152, 102 S.Ct. 1070 (1982) 8

Dugan v. Ohio, 277 U.S. 61, 72 L.Ed. 784, 48 S.Ct. 439 (1927) 18

Ford Motor Company v. Pace (Tennessee 1960), 335 S.W.2d 360 19

Friedman v. Rogers, 440 U.S. 1, 59 L.Ed.2d 100, 99 S.Ct. 887 (1978) 13, 15

Garfinkle v. Superior Court, 21 Cal.3d 268, 146 Cal. Rptr. 208, 578 P.2d 925 (1978) 7

Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 24 Cal.3d 458, 156 Cal.Rptr. 14, 595 P.2d 592 (1979) 7

General GMC Trucks, Inc. v. General Motors Corporation, 239 Ga. 373, 237 S.E.2d 194 (Georgia 1977) 19

General Motors Corporation v. Capitol Chevrolet Company, 645 S.W.2d 230 (Tennessee 1983) 19

Gibson v. Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973) 6

Hortonville District v. Hortonville Association, 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976) 12, 13, 21

Kruger v. Wells Fargo Bank, 11 Cal.3d 352, 113 Cal. Rptr. 449, 521 P.2d 441 (1974) 7

TABLE OF AUTHORITIES CITED

CASES

Page

Laird v. Tatum, 409 U.S. 1, 33 L.Ed.2d 154, 92 S.Ct. 2318 (1972) 15, 16

Lopez v. Henry Phipps Plaza South, Inc., 498 F.2d 937 (2nd Cir. 1974) 15, 17, 18

Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 13 L.Ed.2d 753, 85 S.Ct. 871 (1965) 7, 8

New Motor Vehicle Board v. Orrin W. Fox, 439 U.S. 96, 58 L.Ed.2d 361, 99 S.Ct. 403 (1978) 9

Overlook Nursing Home, Inc. v. United States, 556 F.2d 500 (U.S. Ct. of Claims 1977) 16, 17

Porter County Chapter, etc. v. Nuclear Regulatory Commission, 606 F.2d 1363 (D.C. Cir. 1979) 20, 21

Price v. Civil Service Com., 26 Cal.3d 257, 161 Cal. Rptr. 475, 604 P.2d 1365 (1980) 7

Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982) 16

Tumey v. Ohio, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927) 6

Ward v. Village of Monroeville, 409 U.S. 57, 34 L.Ed. 2d 267, 93 S.Ct. 80 (1972) 6

Withrow v. Larkin, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975) 12, 21

Wolkenstein v. Reville, 694 F.2d 35 (2nd Cir. 1982) 18

Constitutions

United States Constitution:

Fourteenth Amendment 7, 8

California Constitution:

Article 1, Section 7 ..... 2, 5, 6

Table of Authorities Cited

Statutes

	Page
California Vehicle Code:	
Section 3000	2
Section 3001	2, 3
Section 3003	2
Section 3010	2
Section 3050	15
Section 3050(d)	2, 3, 4, 5, 7
Section 3060	1, 2, 9, 20, 22
Section 3060(b)	10
Section 3060(d)	5
Section 3061	2, 10, 19
Section 3062	2, 10, 19
Section 3066(b)	15
Section 3066(d)	2, 3, 4, 5
Section 3069	1
Stats. 1979, ch. 340, § 3, p. 1207	11
28 U.S.C. Section 1257(3)	1

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Petitioners,

vs.

CHEVROLET MOTOR DIVISION,
GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT

Petitioners Northern California Motor Car Dealers Association and Motor Car Dealers Association of Southern California (hereafter sometimes referred to as "the Associations") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeal of the State of California, First Appellate District entered in this proceeding on August 25, 1983 and on which the Supreme Court of the State of California denied Petitioners' petition for hearing by an order made and filed on October 20, 1983. The said judgment and opinion, procured by Respondent Chevrolet Motor Division, General Motors Corporation ("Chevrolet") held that a provision of the California Automobile Franchise Act (California Vehicle Code §§ 3060-3069) violated the Due Process Clause. Petitioners were granted leave to intervene as additional real parties in interest in these proceedings at the trial court level. Additional parties to this action are the New Motor Vehicle Board of the State of California and 49er Chevrolet, both of whom seek review of the said judgment. Petitioners are informed and believe that both of the additional petitioners are also filing Petitions for a Writ of Certiorari in this action with this Court.

OPINION BELOW

The opinion of the Court of Appeal of the State of California is reported as *Chevrolet Motor Division, etc. v. New Motor Vehicle Board,* 146 Cal.App.3d 533, 194 Cal. Rptr. 270 (1983) and appears in the Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeal of the State of California, First Appellate District was entered on August 25, 1983. Thereafter, a timely petition for hearing was denied by the Supreme Court of California on October 20, 1983, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

The provisions of the California Automobile Franchise Act that were held to violate the Due Process Clause in the California Court of Appeal opinion are California Vehicle Code §§ 3050(d) and 3066(d). Those sections, as well as pertinent portions of California Vehicle Code §§ 3000, 3001, 3003, 3010, 3060 and 3061 are set out verbatim in Appendix B hereto. (Unless otherwise indicated, all section references are to sections of the California Vehicle Code.)

The due process clause of the California Constitution is contained in the first sentence of Article I, section 7 of that document. The sentence, in pertinent part, reads:

> A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; . . .

STATEMENT OF THE CASE

Respondent Chevrolet notified 49er Chevrolet ("49er"), its franchised dealer in Angels Camp, California, that 49er's existing franchise would not be renewed when it expired. Pursuant to § 3060, 49er protested this refusal to continue its franchise as the equivalent of a termination under the terms of the section. Under § 3060, Chevrolet could not lawfully terminate 49er's franchise until 49er's protest was heard by the New Motor Vehicle Board ("Board") in accordance with § 3066. At the hearing, Chevrolet was required by § 3066(b) to prove that it possessed good cause for the termination. The Board is directed by § 3061 to consider a number of pertinent facts concerning the operation of the franchise involved in the termination hearing, such as volume of the franchisee's business relative to the volume possible for the particular location, amount of investment by the franchisee, and adequacy of franchisee's sales and service facilities. Given the nature

of these considerations, it is not surprising that § 3001 requires that a minority of four of the nine members of the Board must be licensed new motor vehicle dealers with five years of dealership experience prior to appointment. All members of the Board, who must be of good moral character, are appointed by the Governor of California, except for one public, or non dealer, member appointed by the California Senate Rules Committee and a second non dealer member appointed by the Speaker of the California State Assembly. The foregoing requirements are set out in § 3001, which also requires that one of the five non dealer members must be a member of the California Bar and have been such a member for at least ten years prior to his or her appointment. For reasons that will be discussed below, the four dealer members do not vote in § 3060 termination hearings, but are free to otherwise participate in such hearings, including offering comment and advice to the five non dealer Board members (§§ 3050(d) and 3066(d)).

Following a hearing, the Board sustained 49er's protest and Chevrolet sought a writ of mandate from the San Francisco Superior Court to vacate the Board's decision. Chevrolet claimed that the Board action was improper for many reasons including the assertions that the Board had exceeded its jurisdiction in hearing the 49er protest, and that the Board was not an impartial tribunal because of the non voting participation in the hearing by the dealer members and that such a biased tribunal violated Chevrolet's right to due process of law. While the trial court granted the writ requested on both of the grounds urged by Chevrolet, the California Court of Appeal considered only the biased tribunal claim in affirming the trial court judgment.

The Associations, the Board and Real Party in Interest 49er all timely petitioned the Supreme Court of California

for a hearing of the Court of Appeal judgment. The California Supreme Court, the highest court of that state in which a decision could be had in this matter, denied all three petitions on October 20, 1983, and the Associations now seek a writ from this Court within ninety days following that denial.

In the trial court, Chevrolet specifically alleged in its petition for writ of mandate that the participation of the dealer members of the Board in the 49er termination hearing violated Chevrolet's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution (Chevrolet Petition for Writ of Mandate, California Court of Appeal Clerk's Transcript, page 003, line 15). The Minute Order of the trial court stated the court's view that the dealer member participation authorized by sections 3050(d) and 3066(d) violated due process under the Fourteenth Amendment to the United States Constitution under the rationale of the *American Motors* decision, discussed below (Minute Order, California Court of Appeal Clerk's Transcript, page 237, lines 1-5, and page 237, line 26 to page 238, line 15). While the opinion of the California Court of Appeal refers rather vaguely to violations of "due process," it is clear that the opinion is referring to the Due Process Clause of the Fourteenth Amendment to the United States Constitution, because the opinion completely relies upon a previous decision of the California Court of Appeal in *American Motors Sales Corp. v. New Motor Vehicle Board,* 69 C.A. 3d 983; 138 Cal. Rptr. 594 (1977). In *American Motors,* the court held that voting by dealer members in termination hearings of the Board, pursuant to the language then contained in relevant sections of the Vehicle Code, violated "section 1 of the Fourteenth Amendment to the United States Constitution . . ." (69 C.A. 3d at 985). Thus, the opinion below decided this action on the basis of a federal question.

To avoid possible confusion it should here be noted that the California Legislature responded to the *American Motors* decision in 1977 by amending § 3050(d) and adding § 3060(d) to eliminate dealer member voting in termination hearings. In 1979, those sections were amended to specifically authorize non-voting dealer participation in such hearings, and it is the 1979 version of §§ 3050(d) and 3066(d) that was struck down by the court below.

As discussed below in the first of the reasons for granting the writ, Chevrolet has occasionally mentioned the due process clause of the California Constitution in attacking the Board's action, and the trial court judgment also notes it. However, as will also be discussed below, this is a situation in which it is clear that both the trial and appellate courts below acted under what they conceived to be compulsion of the Federal Constitution, without any independent consideration of the California Constitution or any other California law.

REASONS FOR GRANTING THE WRIT

I

THE COURT BELOW ACTED ON WHAT IT MISTAKENLY BELIEVED WAS THE COMPULSION OF THE FEDERAL CONSTITUTION WITHOUT ANY CONSIDERATION OF CALIFORNIA LAW

As discuused above, Chevrolet mentioned Article I, section 7 of the California Constitution, which contains a due process clause, in its petition for mandate before the trial court in this action, and the trial court judgment also notes it. However, it was the trial court's mistaken view that the Federal Due Process Clause compelled its decision. No decisions of a California state court applying a California due process impartial tribunal requirement were cited or argued before either the trial or appellate courts below. This is because no California court has ever considered

whether a civil statute violates the California due process clause. The decision in *American Motors* was believed to be controlling by the court below, and *American Motors* is based exclusively on a mistaken reading of three decisions of this Court: *Tumey v. Ohio*, 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct. 80 (1972); and, considered the most important by the *American Motors* court, *Gibson v. Berryhill*, 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973) (see 69 C.A.3d at 988-992). Other federal court decisions were also noted in *American Motors*, but, there being no California law on the subject, none was, or could have been, mentioned. The decision below felt that *American Motors* was controlling, and that the due process violation caused by dealer member adjudication in termination hearings was not cured by the statutory amendments that prohibited adjudication and authorized participation in the hearing process.

In the opinion below, the court mentions only one California decision, *Andrews v. Agricultural Labor Relations Board*, 28 Cal. 3d 781, 171 Cal.Rptr. 590, 623 P.2d 151 (1981). *Andrews* involved regulation 20230.4 of the Agricultural Labor Relations Board, not the California Constitution, which is unmentioned in the decision. In *Andrews* the California Supreme Court *refused* to disqualify an administrative hearing officer challenged as being "biased" simply because he may have had a crystallized point of view concerning certain issues of economic and political policy. In refusing to disqualify the administrative law judge, the California Supreme Court acted in accordance with the decisions of this Court and the decisions of courts of other states. The *Andrews* decision is contrary to the theories adopted by the court below. Certainly the fact that the court below attempts to distinguish *Andrews* is no support for the proposition that that court acted under what it thought was the compulsion of that decision.

In point of fact, there is no independently developed biased tribunal jurisprudence under the California due process clause. A number of California decisions have stated that Article I, section 7 of the California Constitution may provide safeguards separate from those afforded by the Fourteenth Amendment (Cf. *Kruger v. Wells Fargo Bank*, 11 Cal.3d 352, 367, fn. 21, 113 Cal.Rptr. 449, 521 P.2d 441 (1974); *Garfinkle v. Superior Court*, 21 Cal.3d 268, 282, 146 Cal.Rptr. 208, 578 P.2d 925 (1978); *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal.3d 458, 469, 156 Cal. Rptr. 14, 595 P.2d 592 (1979); *Price v. Civil Service Com.*, 26 Cal.3d 257, 284, 161 Cal.Rptr. 475, 604 P.2d 1365 (1980)). However, only one of those decisions actually found any separate California proposition of constitutional law that was not compelled by the decisions of this Court under the Fourteenth Amendment. That decision, *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, did *not* involve the due process clause portion of Article I, section 7, but instead was an interpretation of the equal protection clause contained in the same sentence. Thus, as far as due process requirements in civil actions are concerned, there is no separate body of California law under the due process clause of the California Constitution, the clause has never been invoked in a "biased tribunal" decision, except in the most pro forma manner in *American Motors* and the decision below. Decisions of this Court interpreting the Fourteenth Amendment were thought by the California Court of Appeal in *American Motors* to compel the erroneous decision it rendered, and the court below mistakenly believed that it was correct in following *American Motors*. In such a situation, it is clear that the court below struck down sections 3050(d) and 3066(d) "under what it conceived to be the compulsion of the Federal Constitution," to use the words of this Court in *Mental Hygiene Dept. of Cal. v. Kirchner*, 380 U.S. 194, 200, 13 L.Ed.2d 753, 757, 85 S.Ct. 871 (1965). Unlike the California state court decision in-

volved in *Kirchner,* there is no indication or suggestion whatsoever in the opinion below of any reliance upon, or consideration of, California law, which in any event is nonexistent. Specifically, in *Kirchner,* this Court noted that the California court below had viewed certain California decisions concerned in part with guarantees in the California Constitution as controlling precedent. One such precedent contained language strongly suggesting direct reliance upon language in the California Constitution that has no counterpart in the Federal Constitution (See 380 U.S. 194, 198-200). In the context of the ambiguity of the California court opinion, this Court remanded for clarification. Similarly, in *City of Mesquite v. Aladdin's Castle, Inc.,* 455 U.S. 283, 71 L.Ed.2d 152, 102 S.Ct. 1070 (1982), this Court remanded for clarification of an ambiguous decision. The lower court opinion was based upon both federal and state constitutional provisions, several state court decisions were cited as controlling, and the invoked state constitutional provision was written in broader terms than the federal counterpart.

In this action, it is clear that the court below acted solely on the basis of its view of the compulsion of the Federal Constitution. There was no examination of California decisions in *American Motors,* and the decision below relies only on *American Motors* as precedent. Further, the pertinent due process clause language in the California Constitution is identical to that in the Fourteenth Amendment. In this action, the only reference to California law is the meaningless parallel citation to Article I, section 7 by careful counsel. That citation was merely mimicked by the courts below. Such a gambit can not immunize a clearly erroneous and significant state court Federal Due Process Clause decision from review by writ of this Court.

II

THE DECISION BELOW DETERMINES A FEDERAL QUESTION OF GREAT SUBSTANCE IN A WAY THAT CLEARLY CONFLICTS WITH THE APPLICABLE DECISIONS OF THIS COURT

The discussion of reason number three for granting the writ considers the drastic effect of the decision below. A related matter, the legal substance of the question involved, will now be noted, followed by a brief description of why the decision is clearly contrary to the decisions of this Court as well as to various federal circuit and state supreme courts.

The decision below holds that disqualifying bias on the part of an administrative adjudicator is proved, *as a matter of law*, when either of two grounds are shown.[1] First,

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[1]The point that the opinion below is wholly based on mistaken abstractions, rather than facts, is underscored by a consideration of the history of the Board's decisions in § 3060 hearings. The Board has functioned for over nine years, and from July 19, 1974 to December 30, 1983 had entertained 158 dealer protests. The Board sustained the protest (voted "for" the dealer) in only *ten* instances, or 6% of the time. The protest was formally rejected (the Board voting "for" the manufacturer) on 16 occasions, while the other protests were withdrawn or settled without Board decision. As discussed below, this Court rejected a previous challenge to the constitutionality of the California Automotive Franchise Act in *New Motor Vehicle Board v. Orrin W. Fox*, 439 U.S. 96, 58 L.Ed.2d 361, 99 S.Ct. 403 (1978). In that action, Chevrolet asserted that § 3062 of the Act, establishing a protest procedure regarding new franchise placements in market areas served by existing dealers, violated the Due Process Clause of the United States Constitution. In rejecting the Chevrolet argument, this Court noted that the Board very seldom sustained dealer protests in § 3062 hearings (439 U.S. 96, 110, fn. 11, 58 L.Ed.2d 361, 376, fn. 11). From July 1, 1974 until the fall of 1978, 117 dealer protests under § 3062 were filed, resulting in 42 hearings; only one protest was sustained by the Board. Thus, less than 1% of the filings resulted in a Board ruling favorable to a dealer. During the full period of the history of

an administrative adjudicator is biased if he or she has an undefined, contingent, impersonal and seemingly highly remote "economic stake" in the principles of law that may be developed in the case before the administrative tribunal. Second, an administrative adjudicator is also biased if he or she has had or may have had some form of contact with someone who has such an "economic stake" in the outcome of the case before the tribunal. For convenience, the two grounds for disqualifying bias established in the decision below will be referred to as the "economic stake" and the "contamination" inferred bias grounds. Both grounds are said to be based upon the holding in *American Motors*. The Legislature's express determination to include dealer members in termination hearings because of their experience in and knowledge of the business of operating new car dealerships was cavalierly dismissed as mistaken in the decision below, which stated that ". . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers" (146 Cal.App.3d at 538, quoting from *American Motors*). Of course the Legislature was only concerned with regulation of a certain aspect of the business relationship between car manufacturers and dealers, namely whether a dealer's performance in selling, servicing and generally representing a car manufacturer was so deficient compared to the general level of dealer performance in sales, investment, servicing warranties and complying with franchise terms that the manufacturer had "good cause" for terminating the dealer (see Vehicle Code §§ 3060(b) and 3061). On these points, no one

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the Board, the figures on § 3062 hearings also flatly dispel any notion of favoritism for dealers or dealer interests. Of the 346 dealer protests filed under § 3062 with the Board from July 19, 1974 to December 30, 1983, only *13* were sustained by the Board (less than *3%*), while 71 were formally denied by Board decisions in favor of manufacturers. The remaining 262 protests were withdrawn, settled, or, in a few instances, are presently pending a formal hearing. These data are from the public records of the Board.

would question that experienced car dealers possess relevant "unique or peculiar expertise," or that a reasonable legislative determination might be made that the "educated and needed advice of the New Motor Vehicle Board members who are themselves new motor vehicle dealers [should be available to] be utilized in the decision making process of the board" (see 46 Cal.App.3d at 539, quoting from Stats. 1979, ch. 340, § 3, p. 1207). An automobile dealership invariably involves used car operations, consumer financing problems, warranty and repair service requirements, management of a large workforce, and truly substantial internal financial considerations. Expertise gained through experience is obviously desirable, if not a prerequisite, for an administrative tribunal charged with making judgments about "reasonable" business operations and "adequate" retail representation of an automobile manufacturer's product.

Hundreds, if not thousands, of state and federal agencies include members of the occupation or profession the agency regulates, either as the result of statutory command or intelligent choice by the relevant appointive official. This fact is viewed as irrelevant by the decision below because the members of the Board are "no longer merely regulating members of their own occupation [but are now] regulating the economic contractual relations of others with members of their own occupation" (146 Cal. App.3d at 538, quoting *American Motors*). However, it is obvious that occupational licensing agencies (such as the New Motor Vehicle Board) traditionally have regulated the level of service and competence furnished by the members of the occupation to "others" (the consuming public in most cases) as well as the contract terms and methods of advertising used by the members of the occupation in dealing with "others" (including suppliers and creditors as well as consumers). Thus, there is no significant difference in economic substance or practical effect between

the impact of Board rulings upon non automobile dealers (including manufacturers) and the impact of a ruling of any occupational licensing or regulatory agency upon laypersons who deal with members of the regulated occupation.

Turning to the *American Motors* decision, which first announced the "economic stake" ground for inferred bias, it is significant that in the six years since it was rendered, the decision has never been followed as a precedent until the decision below, and its holding has been expressly and inferentially rejected in decisions discussed below. This is because *American Motors* misread this Court's decisions in *Turney, Ward* and *Gibson* to require inferred bias disqualification on the speculative, indirect, and contingent basis of "economic stake." *American Motors* neglected to consider either *Withrow v. Larkin,* 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975) and *Hortonville District v. Hortonville Association,* 426 U.S. 482, 49 L. Ed. 2d 1, 96 S. Ct. 2308 (1976), the most recent occasions prior to *American Motors* on which this Court directly addressed the biased tribunal issue. In *Withrow,* the allegation was made that a licensing board composed of practicing physicians was a "biased tribunal" because it performed an investigative function (determining whether probable cause for criminal action or license revocation existed), as well as an adjudicative function at a subsequent license revocation hearing. This Court refused to hold that the licensing board, *as a matter of law,* was a biased tribunal, and further established that disqualifying bias will be held as a matter of law only when an adjudicator (sitting alone or as a member of a board of adjudicators) either has a *direct* pecuniary interest in the outcome of the dispute or has been the target of personal abuse from one of the parties to the dispute he or she is hearing.

In *Hortonville District,* this Court gave further evidence that disqualifying bias must not be inferred as a matter

of law on the basis of mere group antagonism or conflicting economic interest when it held that a school board was not a biased tribunal in holding disciplinary hearings to determine if certain teachers should be punished for engaging in an illegal strike. The strike allegedly occurred because of the school board's negotiations with the teachers' bargaining agent. The court held that the school board was not a biased tribunal because its members had no personal or direct financial interest in disciplinary action taken against the teachers (see 426 U.S. at 491-497, 49 L. Ed. 2d at 8-12). Turning to the New Motor Vehicle Board, it is clear that absent a showing of specific facts, no dealer member of the Board has any direct pecuniary interest in hearing a franchise termination dispute. Thus *American Motors*, which apparently was based upon that court's view of conflicting economic interests and group antagonism between dealers and manufacturers was, in 1977, contrary to the then controlling precedent from the United States Supreme Court.

Decisions of this Court and principles stated by individual Justices of this Court since *American Motors* was decided in 1977, specifically reject the thinking in that decision. On the need for "balancing" of possibly affected economic interests on tribunals and regulatory boards, *American Motors* was directly overruled by this Court in *Friedman v. Rogers*, 440 U.S. 1, 18, 59 L. Ed. 2d 100, 99 S. Ct. 887 (1978). This Court therein stated that there is no constitutional basis for a due process claim that representatives of different or contending economic interests must be statutorily mandated on regulatory boards which include representatives of one group within an occupation. The sole purpose of the inquiry should be to determine if a member of the board in question has either a personal animosity or a personal, direct and uncontingent pecuniary interest involved in a hearing. The Legislature's decision

to include members of one particular economic or occupational group and not any others is constitutionally irrelevant. Thus, the phrases from *American Motors* relied upon in the decision below at 146 Cal.App.3d 537-538 are all premised upon an erroneous view of the Due Process Clause.

As one example of this erroneous view, *American Motors* condemns the California Legislature because "[i]n effect it took sides in all Board-adjudicated controversies between dealers and manufacturers" by failing to require the appointment of manufacturers (see 69 C.A.3d 983 at 991, quoted at 146 Cal.App.3d 538). *American Motors* goes on to hold that this alleged failure to "balance" renders the Board unconstitutionally biased. In the words of that decision, "This legislative partisanship damns the Board" (69 C.A.3d at 991, quoted at 146 Cal.App.3d 538). The "combination" of four factors said by the *American Motors* court to render the Board unconstitutionally biased amounts only to an overly elaborate restatement of the florid phrase just quoted (see 69 C.A.3d 983 at 992, quoted at 146 Cal.App.3d 538). Thus, it appears that if there had been a "counterbalancing," and the Act required four "manufacturer members" of the Board in termination hearings ("factor (2)"), the Board would have been held unbiased by the *American Motors* court. In reacting to the statutorily mandated presence of dealer members solely on the basis of the majority's feelings of fairness or emotionally held views of statutory propriety, the *American Motors* court neglected to attempt an analysis to determine if the dealer members actually had any personal, direct and uncontingent interest in all dealer termination hearings. This neglectful approach is clearly wrong under all applicable precedents and is close to an usurpation of the constitutional power of the California Legislature to legislatively establish administrative agencies.

While the "balancing" requirement of *American Motors* is bad constitutional law and bad institutional policy, the decision below specifically embraced the balancing requirement as the crucial test for "implied bias" and held that the lack of mandated manufacturer members voids §§ 3050 and 3066 as violative of the Due Process Clause (see specifically 146 Cal.App.3d at 541, as well as the quotations from *American Motors* at 146 Cal.App.3d 537-538).

While *Friedman v. Rogers* specifically rejects the basis for the *American Motors* holding, the opinion by Justice Powell in the former case is also instructive on the broader issue of legislative freedom in the regulation of economic life. In a footnoted statement specifically referenced to the Court's complete rejection of the argument that the Due Process Clause requires some form of balancing of affected economic interest on administrative tribunals, the Court stated: "The Due Process Clause imposes only broad limits, not exceeded here, on the exercise by a State of its authority to regulate its economic life . . . (citations)" (440 U.S. at 18). This principle was violated by the decision below and by *American Motors*. Both decisions also violate another controlling Due Process Clause principle that has been recently invoked by federal courts in considering "implied bias" claims: that due process is a flexible concept and its "very nature . . . negates any concept of inflexible procedures applicable to every imaginable situation" (*Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed. 2d 1230, 1236, 81 S.Ct. 1743, 1748 (1961), quoted by Judge Friendly in *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937, 944 (2nd Cir. 1974), discussed *infra*).

Regarding the decision in *Laird v. Tatum*, 409 U.S. 1, 33 L.Ed.2d 154, 92 S.Ct. 2318 (1972), Justice Rehnquist issued a memorandum found at 409 U.S. 824 on the subject of disqualification of judges because of previously expressed points of view on legal, political and economic issues involved in cases before the court. Justice Rehnquist

firmly rejected the notion that tribunals are either required to, or should, be made up of persons with no expertise or prior policy judgments concerning cases to be heard (see 409 U.S. at 835-839). In *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982), this Court refused to impute bias on the part of a juror in a criminal trial who, during the trial, applied for employment as a "major felony investigator in the District Attorney's Office" that successfully prosecuted the case. Even in the context of a criminal prosecution, this Court refused to assume, as a matter of law, that a juror was "biased" on the basis of speculation and conjecture about possible expectations of contingent future economic benefit dependent upon the outcome of the trial. Of course, just such an assumption of bias as a matter of law *was* made in *American Motors* and the decision below.

Because of the firm posture of this Court disfavoring imputations of bias generally and requiring the existence of a direct, uncontingent and certain financial interest in the outcome of the hearing before implied bias can be found, it is expectable that federal appellate courts have consistently rejected the type of speculative "economic stake" claims of bias embraced by *American Motors* and the decision below. In *Overlook Nursing Home, Inc. v. United States*, 556 F.2d 500 (U.S. Ct. of Claims 1977), Overlook, a provider of Medicare services disputed the decision of its fiscal intermediary, Travelers Insurance Co., to reject payment of approximately $360,000 of claimed reimbursable costs. An administrative board was convened to rule on Overlook's claim, and two of the three board members were employees of Travelers. The board denied further recovery. Overlook sought court review, claiming that the two Travelers employees were biased as a matter of law because Travelers, as a private insurance company, "would have an interest in similar issues [concerning the right of health care providers to reimbursement from an insurer] where it would be itself the health

insurer under private, non-governmental plans, and would wish to establish precedents unfavorable to providers" (556 F.2d at 502-3). After a thorough review of applicable precedent, the court concluded, "[T]his plaintiff's theory is two [sic] conjectural and the character of the bias alleged too attenuated for us to agree that due process, a flexible and practical concept by nature, was offended" (556 F.2d at 504). Overlook's claim regarding the economic stake of Travelers in favorable precedent denying insurer liability is closely analogous to the *American Motors* claim that dealer members have an "economic stake" in holding that a manufacturer has not shown "good cause" to terminate a dealer for low sales performance (69 C.A.3d 987, quoted as controlling in the decision below, page 4). In the case at bar, as in *Overlook*, the asserted value of "precedent" is not a direct, uncontingent and certain benefit that would realistically lure a presumably impartial board member to make a biased decision. Such a claim of bias is, indeed "conjectural" and "attenuated."

Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit has discussed the issue of implied bias on two occasions in recent years, and the decisions repay close study. In the first, *Lopez v. Henry Phipps Plaza South, Inc.*, 498 F.2d 937 (2nd Cir. 1974), Judge Friendly rejected an argument that a hearing officer was "management oriented," noting that although the officer might well have a point of view and possess valuable expertise, this did not render him incapable of being impartial for due process purposes. The flexible nature of the due process concept and the need for lower standards of impartiality in administrative hearings than required of a judge or juror were noted. On the last point, Judge Friendly wrote, "The fact that [the hearing officer] might have been disqualified as a judge or subject to challenge for cause as a juror in a dispute between Phipps and Mrs.

Lopez does not, either in principle or under the authorities, infect the hearing with a lack of due process" (448 F.2d at 944).

In *Wolkenstein v. Reville,* 694 F.2d 35 (2nd Cir. 1982), Judge Friendly provides a more elaborate discussion and analysis of a charge of "implied bias" in an administrative tribunal context. Noting applicable precedents, the flexibility of the due process concept, and the presumption of honesty, integrity and impartiality that the United States Supreme Court mandates for administrative adjudicators, Judge Friendly held that no implied bias reaching the level of due process concern had been shown. Regarding the claim that the adjudicator, a school superintendent, had a disqualifying pecuniary interest in the determinations at issue, the Judge held that a "direct, personal pecuniary interest" must be shown, and that since the superintendent's salary was fixed, he had neither a direct nor an indirect pecuniary interest in maximizing the penalties imposed. The Judge considered it possible that the superintendent might receive a higher salary if he ruled that the school system could collect large penalties from striking teachers to be used for general school budget purposes, including administrative salaries. However, this type of contingent and speculative "benefit" was held to be no different from the mayor-judge's nondisqualifying interest in the city treasury in *Dugan v. Ohio,* 277 U.S. 61, 72 L.Ed. 784, 48 S.Ct. 439 (1927) (see 694 F.2d at 42 and fn. 7).

Thus, all federal court precedents are contrary to *American Motors* and the decision below on the issue of whether a vague, impersonal, highly contingent adverse "economic stake" can constitute constitutionally impermissible bias. It is not surprising that, *on the precise issue* determined in *American Motors* and the decision below, three decisions of the supreme courts of other states have held dealer board members to be free of any implied disqualifying bias

in hearings to determine if a franchise was terminable for "good cause" (See *Ford Motor Co. v. Pace*, 335 S.W.2d 360, 367 (Tennessee 1960); *General GMC Trucks, Inc. v. General Motors Corp.*, 239 Ga. 373, 237 S.E.2d 194, 195-6 (Georgia 1977); *General Motors Corp. v. Capitol Chevrolet Co.*, 645 S.W.2d 230, 235-8 (Tennessee 1983)). The *Capitol Chevrolet* decision is a particularly well reasoned treatment of the issue. In it, the *American Motors* holding is specifically rejected and the claim of "pecuniary interest" of all dealers in ruling against manufacturers draws this comment: "This is so attenuated and speculative, in absence of proof of actual interest or bias, that we are simply unable to accept it" (645 S.W.2d at 237). Inexplicably, the decision below cites these three state supreme court decisions *as support* for its view that *American Motors* is the controlling precedent (146 Cal.App.3d at 538).

In analyzing the "economic stake" an otherwise totally impartial dealer member has in a particular termination hearing, it is clear that the dealer has no *personal* interest whatsoever in the case because he or she would be challenged for cause if the dealer member owned, or had any interest in, the dealership involved. Any "economic stake" interest is therefore impersonal. Any such interest is also highly contingent, depending on the dealer's speculation concerning a number of possible future events, and he or she must make *all* of the following determinations before his decision could be affected by any "bias." The dealer must conclude that *if* in the future his or her dealership is terminated by the franchising manufacturer, and *if* he or she protests, and *if* the Board's decisions under any of the "good cause" factors listed in Vehicle Code § 3061 are generally considered useful as "precedents" by the *then* sitting Board, and *if* the case presently before the Board might be decided so as to

become a helpful precedent in a *future* dispute with the dealer's manufacturer, and *if* a majority of the then sitting nine member Board can be persuaded to vote against the dealer's franchise termination in whole or in part because of the favorable "precedent" that might be fashioned out of the case presently before the Board, the dealer *might* vote on the case before the Board in a manner to create a favorable precedent (*if* the dealer has a reasonable chance of persuading four or more fellow Board members to join him or her in the vote).

The above analysis shows the speculative, conjectural, even metaphysical nature of the alleged "economic stake" or "potential pecuniary interest" bias argument adopted by *American Motors* and the decision below. In point of fact, there is no meaningful "economic stake" that dealer members possess in § 3066 hearings. The dealer members merely have expertise and, in all likelihood, some informed opinions about the general nature of manufacturer-dealer relationships. Neither expertise nor informed opinions are, or should be, considered a basis for inferred disqualification.

Turning to the "contamination" ground for inferred bias, no court prior to the decision below has ever held that an admittedly unbiased administrative adjudicator becomes biased, as a matter of law, because he or she may discuss the matter to be adjudicated with an allegedly biased person. Using the applicable standards developed by this Court, discussed above, it cannot be seriously argued that the non dealer members of the Board have a direct pecuniary interest in § 3060 hearings, nor can it be argued that the public members have been subjected to abuse by all automobile manufacturers.

On this point, the decision in *Porter County Chapter, etc. v. Nuclear Regulatory Commission,* 606 F.2d 1363 (D.C. Cir., 1979), is instructive. The petitioners in that case

argued that NRC was biased because it may have been influenced by the recommendations of its staff, which had previously opposed the construction permit at issue and allegedly would be unable to fairly consider a petition to commence proceedings to revoke the permit. The court reviewed the *Withrow* and *Hortonville District* decisions as the controlling precedents, concluded that the staff of NRC could not be considered biased for purposes of the Due Process Clause, and stressed that, in any event, the members of the staff were not adjudicators on the tribunal (the NRC) making the determination (see 606 F.2d at 1371-1372).

The decision below attempts to avoid the logic of the *Porter County* decision by declaring that unlike staffs of agencies, the dealer members have the abovementioned vague and nebulous "economic stake" in each hearing before the agency (146 Cal.App.3d 540-541). However, everyone knows that agency staffs, as well as judicial clerks and any number of colleagues of judges and administrative adjudicators have strong points of view and express them to adjudicators. As long as the judges and adjudicators are presumed to be impartial, fair, and honest, no court should hold that such judicial or administrative officers become hopelessly contaminated by contact with allegedly "biased persons." Unless this Court corrects the mischief of the decision below, one may well wonder what new law will begin to evolve requiring seclusion or some form of sequestration of all adjudicators in order to prevent such "contamination."

III

THE DECISION BELOW CREATES A CONFLICT BETWEEN STATE COURTS OF LAST RESORT ON A QUESTION OF GREAT SIGNIFICANCE, AND THE ERRONEOUS THEORIES ANNOUNCED IN THE DECISION BELOW CALL INTO QUESTION VIRTUALLY ALL ADMINISTRATIVE TRIBUNAL DECISIONS IN SITUATIONS IN WHICH THE TRIBUNALS INCLUDE PARTICIPANTS IN THE ECONOMIC LIFE REGULATED BY THE TRIBUNAL

As discussed above, the decision below conflicts with decisions from two other states on the specific issue of the inclusion of dealer members on administrative boards that pass upon the legality of a termination of the franchise of an automobile dealer. All states except Alaska now offer dealer franchisees some form of state legislated protection against unreasonable terminations, and boards with dealer members make decisions upon franchise terminations in 13 states (Arkansas, California, Colorado, Delaware, Louisiana, Mississippi, Nebraska, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee and Texas). Thus, the precise issue determined in the decision below will now have to be addressed by many different courts faced with conflicting views of the application of the Due Process Clause to dealer membership in administrative tribunals performing the same function as the Board in § 3060 hearings.

However, the more ominous significance of the decision below is the announcement of the nebulous but broad concepts of "economic stake" and "contamination" as grounds for invalidating administrative tribunal actions and negating the decisions of legislatures or appointing executive officials to insure that administrative tribunals possess adequate expertise to deal intelligently with complicated issues in our nation's economic life. Without the ability to appoint

tribunal members who participate in the regulated field of economic activity, the state and federal administrative process will be severely hampered, if not hamstrung.

For these reasons, a writ of certiorari should issue to the judgment and opinion of the Court of Appeal of the State of California for the First Appellate District.

Respectfully submitted,

JAMES R. MCCALL
Professor of Law, U.C. Hastings,
Of Counsel
RICHARD E. CROW
Counsel of Record
CROW, LYTLE, GILWEE,
DONOGHUE, ADLER & WENINGER

Appendix A

In the Court of Appeal
of the
State of California

First Appellate District

Division Three

A015529
(Super. Ct. No. 777974)

Chevrolet Motor Division, General Motors Corporation,
Plaintiff and Respondent,

v.

New Motor Vehicle Board, Defendant and Appellant;
49er Chevrolet, Real Party in Interest and Appellant;
Northern California Motor Car Dealers Association, Inc.,
et al., Interveners and Appellants.

[Filed August 25, 1983]

This appeal is from a judgment granting a peremptory writ of mandamus, ordering that a decision of the state's New Motor Vehicle Board (the Board) be set aside. Appellants are the Board, real party in interest 49er Chevrolet (49er), and two associations of car dealers, Northern California Motor Car Dealers Association, Inc. and Motor Car Dealers of Southern California, Inc. (Associations), who were granted leave to intervene below. Respondent is Chevrolet Motor Division, General Motors Corporation (Chevrolet).

I

The relevant facts are as follows. Chevrolet notified 49er, its dealer in Angels Camp, that when their existing franchise agreement expired on October 31, 1980, a new agreement would not be offered. 49er protested to the Board pursuant to Vehicle Code section 3060,[1] which provides in pertinent part that "no franchisor shall terminate or refuse to continue any existing franchise" for the marketing of new motor vehicles "unless" the Board "finds . . . good cause for termination or refusal to continue" the franchise. The Board consists of nine members, four of whom are required to be new motor vehicle dealers. (§§ 3000, 3001.) At a hearing on a dealer-manufacturer dispute, the dealer members of the Board may participate, hear, and comment or advise other members, but they may not "decide" the matter. (§§ 3050, subd. (d), 3066, subd. (d).)

After a hearing, the Board sustained 49er's protest. Chevrolet then filed this action, seeking to require the Board to vacate its decision. The trial court granted the petition for writ of mandate on two grounds: (1) participation of dealer board members in the deliberative process, without participation of manufacturers, deprived the manufacturers of an impartial tribunal, violating due process; and (2) the Board was without jurisdiction to hear 49er's protest as the manufacturer neither "terminat[ed] [n]or refus[ed] to continue any existing franchise" within the meaning of section 3060. This appeal followed.

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[1]Unless otherwise indicated, all statutory references are to the Vehicle Code.

II

When the Board was originally established in 1967 as the New Car Dealers Policy and Appeals Board, it functioned much as do other state occupational licensing boards. Among its duties, for example, was the hearing of appeals by licensed dealers from decisions of the Department of Motor Vehicles. (See Stats. 1967, ch. 1397, § 2, p. 3261 et seq.; see *American Motors Sales Corp. v. New Motor Vehicle Bd.* (1977) 69 Cal.App.3d 983, 986.) Four of the Board's nine members were required to be "new car dealers." (Stats. 1967, ch. 1397, § 2, pp. 3261-3262.)

In 1973 the Legislature renamed the Board the New Motor Vehicle Board, and added sections 3060 to 3069, which established a series of procedures for the adjudication of disputes between dealers and new car manufacturers. (Stats. 1973, ch. 996, § 16, p. 1967-1971.) Among other duties, the Board was empowered to determine whether there is "good cause" to terminate or refuse to continue a franchise. (§ 3060.) The requirement that four of the Board's members be new car dealers was not changed.

In *American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d 983, a dealer-franchisee protested a noticed termination to the Board, which found that good cause had *not* been shown. (*Id.*, at p. 985.) As in the present case, the franchisor challenged the Board's decision by petitioning the superior court for relief in administrative mandamus. The superior court granted relief, concluding that sections 3060 and 3066 of the Act violated due process " 'because four of the nine members of the

Board are . . . new car dealers, who may reasonably be expected to be antagonistic to franchisors . . . .'" (*Ibid.*)

In a 2-1 decision, the Court of Appeal affirmed, and the Supreme Court denied a petition for hearing. After taking note of "a long history of legal warfare between the automobile manufacturers and their dealers" (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal. App.3d at p. 986), the court found it "unavoidable that dealer-members of the Board have an economic stake in every franchise termination case that comes before them. The ability of manufacturers to terminate any dealership, including that of a Board member, depends entirely upon the Board's interpretation of 'good cause.' It is to every dealer's advantage not to permit termination for low sales performance, which fact however is to every manufacturer's disadvantage." (*Id.*, at p. 987.)

The court acknowledged that in some instances a dealer Board member might be more financially interested in ruling in favor of the manufacturer, i.e., where the franchise of a competitor was being terminated, or where the dealer wished to ingratiate itself with its own manufacturer. The court viewed this not as fairness, but as an equalizing unfairness. "Either way, the objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at pp. 987-988.)

The court distinguished cases holding that a licensing or regulatory agency may constitutionally be composed in

whole or in part of members of the business regulated, on the ground that the members of this Board were no longer merely regulating members of their own occupation. Instead, they were regulating the economic and contractual relations of others with members of their own occupation, but ". . . car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at pp. 990-991.)

The court then stated that the Legislature's "requirement that the nine-man Board consist of at least four car dealers" meant that "[i]n effect it [the Legislature] took sides in all Board-adjudicated controversies between dealers and manufacturers, making certain that the dealer interests would at all times be substantially represented and favored on the adjudicating body. This legislative partisanship damns the Board." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra*, 69 Cal.App.3d at p. 991.) "[T]he objectionable feature of dealer-membership on the Board is the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." (*Id.*, at pp. 987-988.) "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases [citation], their *mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." (*Id.*, at p. 992, original emphasis, fn. omitted.)

The court concluded as follows: "What we hold is that the combination of (1) the mandated dealer-Board mem-

bers, (2) the lack of any counterbalance in mandated manufacturer members, (3) the nature of the adversaries in all cases (dealers v. manufacturers), and (4) the nature of the controversy in all cases (dispute between dealer and manufacturer) deprives a manufacturer-litigant of procedural due process, because the state does not furnish an impartial tribunal." (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 992; cf. *General Motors Corp. v. Capitol Chevrolet* (Tenn. 1983) 645 S.W.2d 230; *Ford Motor Company v. Pace* (1960) 206 Tenn. 559 [335 S.W.2d 360]; *Gen. GMC Trucks v. Gen. Motors Corp.* (1977) 239 Ga. 373 [237 S.E.2d 194].)

In reaction to the *American Motors Sales Corp.* decision, the Legislature amended Section 3050, subdivision (d), and added subdivision (d) to section 3066 to provide that no member of the Board who is a new motor vehicle dealer may participate in, deliberate on, hear or consider, or decide, any matter involving a dispute between manufacturer and dealer. (See Stats. 1977, ch. 278, §§ 2-3, pp. 1171-1173; *Chrysler Corp. v. New Motor Vehicle Bd.* (1979) 89 Cal.App.3d 1034, 1037.) However, in a 1979 enactment which took effect as urgency legislation, the Legislature again amended the statutes, this time providing that dealer members of the Board "may participate in, hear, and comment or advise other members upon, but may not decide," any matter involving a dealer-manufacturer dispute. (§§ 3050, subd. (d), 3066, subd. (d); Stats. 1979, ch. 340, §§ 1-2, pp. 1206-1207.) According to the Legislature's declaration of urgency, the amendment was necessary "[i]n order that the educated and needed advice of New Motor

Vehicle Board members who are themselves new motor vehicle dealers may be utilized in the decision making process of the board. . . ." (Stats. 1979, ch. 340, § 3, p. 1207.)

The trial court in this case concluded that the amendments to sections 3050 and 3066 did not "cure the unconstitutionality of the earlier provisions of the statute. . . ." The court reasoned that although dealer-Board members no longer have the right to vote, they have the opportunity fully to participate otherwise in the adjudicatory process, whereas the manufacturers are still left unrepresented.

First, appellants 49er and the Board argue that Chevrolet was not entitled to raise this constitutional question for the first time in the trial court. The general rule is that an issue not raised at an administrative tribunal may not be raised in subsequent judicial proceedings. (See, e.g., *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1019-1020.) However, a litigant who seeks to challenge the constitutionality of the statute under which an agency operates need not raise that issue in proceedings before the agency as a condition of raising the issue in the courts. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 250-251; *Chrysler Corp. v. New Motor Vehicle Bd., supra,* 89 Cal.App.3d at pp. 1038-1039.)

Here Chevrolet was seeking a declaration that the statutes prescribing the Board's membership were unconstitutional. The Board itself could not have granted this relief because the Constitution expressly provides that an "administrative agency . . . has no power . . . [t]o declare

a statute unconstitutional. . . ." (Cal. Const., art. III, § 3.5.) There was no waiver of Chevrolet's right to raise the constitutional issue in the trial court in these circumstances.

The Board and 49er also argue that Chevrolet should have requested that the dealer members "recuse" themselves from participating. The dealer members of the Board constituted almost half of its total membership (see §§ 3000-3001), and as members they were authorized to participate in franchise disputes. (See § 3050, subd. (d).) If this argument were accepted, predictably automatic requests for the recusal of dealer members would have the effect of routinely depriving the Board of participation by a substantial number of its members in situations involving one of its basic functions. Clearly their recusal was not intended by the Legislature.

Next, appellants contend that *American Motors* is now of questionable validity, in light of *Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781. In that case, the Supreme Court held that an administrative law officer with expressed or "crystallized" political or legal views cannot be disqualified on that basis alone, even if those views result in an appearance of bias. (*Id.*, at pp. 791, 793-794.) Appellants reason that the group antagonism and economic conflict between dealers and manufacturers mean that car dealer Board members at most may have "crystallized views" about policy issues in adjudications between manufacturers and dealers. After *Andrews*, appellants urge, absent proof of actual bias, such views are not enough to support a holding that an adjudicator cannot provide a fair tribunal.

However, the *American Motors* court did not find the dealer Board members partial because of their views on issues of law or policy; rather, that court squarely held that those Board members had an "economic stake" in every franchise termination case which came before them. The *Andrews* court itself acknowledged that no proof of actual bias is required for disqualification when a judicial officer has a financial interest in a case. (*Andrews v. Agricultural Labor Relations Bd., supra,* 28 Cal.3d at p. 793, fn. 5.)

Appellants then argue that the Board is not a biased tribunal and its action in this case did not deny Chevrolet due process because none of the "adjudicator members" of the Board were biased. Appellants emphasize that there is no contention made that any factor exists which could lead a court to find that the five public members of the Board were or are biased. According to appellants, the dealer members' participation in these proceedings was solely to provide expert advice, a function analogous to that provided to other boards or commissions by agency staff members or assistants. (See, e.g., *Porter County Chapter v. Nuclear Reg. Com'n* (D.C. Cir. 1979) 606 F.2d 1363, 1370-1372.)

We are not persuaded by appellants' attempts to minimize the dealer Board members' role in these proceedings. Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. (*American Motors Sales Corp. v. New Motor Vehicle Bd., supra,* 69 Cal.App.3d at p. 987.) Nevertheless, they are permitted to participate actively in hearings on dealer-manufacturer disputes, hear the evidence, and comment upon and advise other Board members

in such matters. In other words, although they must stop short of actually voting on a dispute, they may take part in every other aspect of the decision-making process, despite their financial interest in the outcome of that process. The Board has numerous powers and duties other than hearing protests by dealers, and the dealer Board members' participation in those other tasks is unrestricted. (See § 3050.) Because of their ongoing working relationship, public members of the Board may be influenced by arguments or facts suggested by the dealer members but not included in the public record, and the parties themselves may not have the opportunity to respond.

In short, the presence of biased members on the Board presents a substantial probability that decisions in dealer-manufacturer disputes will be made on the basis of inappropriate considerations, and the fact that those members do not technically "decide" the dispute does not alter that probability. Each of the factors enumerated in *American Motors* is still present. The Board is still required by statute to have four dealer members. (See § 3001.) The statute neither requires nor authorizes manufacturer members. (See *ibid.*) The nature of the adversaries and the controversies between them remains the same. These problems have not been remedied by the subsequent changes in sections 3050 and 3066. Accordingly, the trial court did not err when it concluded that participation of the Board's dealer members in these proceedings denied Chevrolet an unbiased tribunal.

In light of our conclusion, we need not consider appellants' contention that the court also erred when it concluded

that Chevrolet did not terminate or refuse to continue the franchise within the meaning of section 3060.

Judgment is affirmed.

CERTIFIED FOR PUBLICATION

Scott, J.

We concur:

White, P.J.

Feinberg, J.

Appendix B

California Vehicle Code Sections

* * *

§ 3000. *Board Created*

There is in the Department of Motor Vehicles a New Motor Vehicle Board, which consists of nine members.

§ 3001. Qualifications of board members

Four of the appointive members of the board shall be new motor vehicle dealers as defined in Section 426 who have engaged for a period of not less than five years preceding their appointment in activities regulated by Article 1 (commencing with Section 11700) of Chapter 4 of Division 5. These members shall be appointed by the Governor.

Each of the five remaining appointive members shall be a public member who is not a licentiate under Article 1 * * * of Chapter 4 of Division 5 or an employee of such licentiate at the time of such appointment and one of these five appointive members shall have been admitted to practice law in the state for at least 10 years immediately preceding his appointment. One public member shall be appointed by the Senate Rules Committee, one by the Speaker of the Assembly, and three by the Governor.

Each member shall be of good moral character.

* * *

§ 3003. *Terms of office*

Each appointive member of the board shall be appointed for a term of four years and shall hold office until the appointment and qualification of his successor or until six months shall have elapsed since the expiration of the term for which he was appointed, whichever first occurs.

* * *

§ 3010. *Quorum*

Five members of the board shall constitute a quorum for the transaction of business, for the performance of any duty or the exercise of any power or authority of the board, except that three members of the board, who are not new motor vehicle dealers, shall constitute a quorum for the purposes of Article 4 (commencing with Section 3060) of this chapter.

§ 3050. *Duties*

The board shall do all of the following:

* * *

(d) Hear and consider, within the limitations and in accordance with the procedure hereinafter provided, a protest presented by a franchisee pursuant to Section 3060, 3062, 3064, or 3065. A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to Article 4 (commencing with Section 3060).

§ 3060. *Termination of Franchise*

Notwithstanding the terms of any franchise, no franchisor shall terminate or refuse to continue any existing franchise unless:

(a) The franchisee and the board have received written notice from the franchisor as follows:

(1) Sixty days before the effective date thereof setting forth the specific grounds for termination or refusal to continue.

(2) Fifteen days before the effective date thereof setting forth the specific grounds with respect to any of the following:

(i) Transfer of any ownership or interest in the franchise without the consent of the franchisor, which consent shall not be unreasonably withheld.

(ii) Misrepresentation by the franchisee in applying for the franchise.

(iii) Insolvency of the franchisee, or filing of any petition by or against the franchisee under any bankruptcy or receivership law.

(iv) Any unfair business practice after written warning thereof.

(b) The board finds that there is good cause for termination or refusal to continue, following a hearing called pursuant to Section 3066. The franchisee may file a protest with the board within 30 days after receiving a 60-day notice, or within 10 days after receiving a 15-day notice. When such a protest is filed, the board shall advise the franchisor that a timely protest has been filed, that a hearing is required pursuant to Section 3066, and that the franchisor may not terminate or refuse to continue until the board makes its findings.

(c) The franchisor has received the written consent of the franchisee, or the appropriate period for filing a protest has elapsed.

The franchisor shall not modify or replace a franchise with a succeeding franchise if such modification or replacement would substantially affect the franchisee's sales or service

obligations or investment, unless the franchisor shall have first given the board and each affected franchisee notice thereof at least 60 days in advance of such modification or replacement. Within 30 days of receipt of such notice, a franchisee may file a protest with the board and such modification or replacement shall not become effective until there is a finding by the board that there is good cause for such modification or replacement. If, however, a replacement franchise is the successor franchise to an expiring or expired term franchise, such prior franchise shall continue in effect until resolution of the protest by the board. In the event of multiple protests, hearings shall be consolidated to expedite the disposition of the issue.

§ 3061. *Good Cause*

In determining whether good cause has been established for modifying, replacing, terminating, or refusing to continue a franchise, the board shall take into consideration the existing circumstances, including, but not limited to:

(1) Amount of business transacted by the franchisee, as compared to the business available to the franchisee.

(2) Investment necessarily made and obligations incurred by the fanchisee to perform its part of the franchise.

(3) Permanency of the investment.

(4) Whether it is injurious or beneficial to the public welfare for the franchise to be modified or replaced or the business of the franchisee disrupted.

(5) Whether the franchisee has adequate motor vehicle sales and service facilities, equipment, vehicle parts, and qualified service personnel to reasonably provide for the

needs of the consumers for the motor vehicles handled by the franchisee and has been and is rendering adequate services to the public.

(6) Whether the franchisee fails to fulfill the warranty obligations of the franchisor to be performed by the franchisee.

(7) Extent of franchisee's failure to comply with the terms of the franchise.

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§ 3066. *Hearings on Protests*

(a) Upon receiving a notice of protest pursuant to Section 3060, 3062, 3064, or 3065, the board shall fix a time, which shall be within 60 days of such order, and place of hearing and send by registered mail a copy of the order to the franchisor, the protesting franchisee, and all individuals and groups which have requested notification by the board of protests and decisions of the board. The board, or a hearing officer designated by the board, shall hear and consider the oral and documented evidence introduced by the parties and other interested individuals and groups, and the board shall make its decision solely on the record so made. Government Code Sections 11507.6, 11507.7, except subdivision (c), 11510, 11511, 11513, 11514, 11515, and 11517 shall be applicable to such proceedings.

(b) In any hearing on a protest filed pursuant to Section 3060 or 3062, the franchisor shall have the burden of proof to establish that there is good cause to modify, replace, terminate, or refuse to continue a franchise. The franchisee shall have the burden of proof to establish there is good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership.

(c) In any hearing on a protest filed pursuant to Section 3064 or 3065, the franchisee shall have the burden to establish that the schedule of compensation or the warranty reimbursement schedule is not reasonable.

(d) A member of the board who is a new motor vehicle dealer may participate in, hear, and comment or advise other members upon, but may not decide, any matter involving a protest filed pursuant to this article. Dealer participation shall be recorded in the minutes of the meeting.

SEE COMPANION CASE